

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 16-02129-SJO (RAOx) Date: October 3, 2017
Title: Cory Spencer, et al. v. Lunada Bay Boys, et al.

Present: The Honorable **ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE**

Sandra L. Butler	N/A
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

N/A

N/A

Proceedings: (In Chambers) **MINUTE ORDER GRANTING IN PART
PLAINTIFFS’ MOTION FOR ADMINISTRATIVE RELIEF
PURSUANT TO FRCP 56(d) [397]**

On August 8, 2017, Plaintiffs Cory Spencer, Diana Milena Reed, and Coastal Protection Rangers, Inc. (collectively, “Plaintiffs”) filed their Motion for Administrative Relief Pursuant to FRCP 56(d) (“Rule 56(d) Motion”). Dkt. No. 397. On August 15, 2017, Defendants City of Palos Verdes Estates (“City”) and Jeff Kepley (collectively, “City Defendants”), Brant Blakeman, Michael Papayans, and Charlie and Frank Ferrara filed their oppositions to the Rule 56(d) Motion. Dkt. Nos. 404-407. On August 22, 2017, Plaintiffs filed their reply. Dkt. No. 428. On August 28, 2017, District Judge Otero referred the Rule 56(d) Motion to the undersigned for disposition. Dkt. No. 435.

The Court held telephonic hearings on September 5, 2017 and September 12, 2017 regarding the Rule 56(d) Motion and other referred matters, and directed Plaintiffs and the City Defendants to file further briefing on the Rule 56(d) Motion as it relates to the City Defendants. Dkt. Nos. 443, 452. Plaintiffs filed their brief on September 21, 2017, Dkt. No. 464, and the City Defendants filed their response on September 25, 2017, Dkt. No. 465. The Court has considered the relevant briefing filed by the parties and the arguments made at the September 5, 2017 and September 12, 2017 hearings. For the reasons set forth below, the Court GRANTS-IN-PART and DENIES-IN-PART Plaintiffs’ Rule 56(d) Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on March 29, 2016, against the Lunada Bay Boys, Sang Lee, Brant Blakeman, Alan Johnston, Michael Papayans, Angelo Ferrara, Frank Ferrara, Charlie

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Ferrara, N.F., City of Palos Verdes Estates, and Chief of Police Jeff Kepley (collectively, “Defendants”).¹ Dkt. No. 1. Plaintiffs assert the following causes of action against Defendants: (1) violation of the Bane Act, California Civil Code § 52.1(b), against the Lunada Bay Boys and Individual Defendants; (2) public nuisance pursuant to California Civil Code §§ 3479 and 3480 against the Lunada Bay Boys and Individual Defendants; (3) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983, against City Defendants; (4) violation of the Privileges and Immunities Clause of Article IV of the United States Constitution, pursuant to § 1983, against City Defendants; (5) violation of various provisions of the California Coast Act against Defendants; (6) assault against the Lunada Bay Boys and Individual Defendants; (7) battery against the Lunada Bay Boys and Individual Defendants; and (8) negligence against the Lunada Bay Boys and Individual Defendants. *See* Compl. ¶¶ 43-106. On July 11, 2016, Plaintiffs' claims pursuant to the Privileges and Immunities Clause and the California Coast Act were dismissed with prejudice by the District Judge. *See* Dkt. No. 84. On February 21, 2017, the District Judge denied Plaintiffs' motion for class certification. *See* Dkt. No. 225.

Plaintiffs allege that the Individual Defendants and other members of the Lunada Bay Boys have unlawfully interfered with Plaintiffs' usage and enjoyment of Lunada Bay, located in the Palos Verdes Estates area. *See* Compl. ¶¶ 15-26. Plaintiffs allege that Lunada Bay is well-known in the surfing world for localism, a practice whereby resident surfers attempt to exclude outsiders through threats, intimidation, and violence. *See id.* ¶ 17. Additionally, Plaintiffs allege that the City Defendants are aware of the Lunada Bay Boys' criminal activity, but the City has a policy, custom and practice of not taking action against the Lunada Bay Boys and the Individual Defendants. *See id.* ¶¶ 27-28.

On July 14, 2017, the City Defendants filed a motion for summary judgment. Dkt. No. 268. Defendant Lee filed his motion for summary judgment on July 21, 2017. Dkt. No. 274. Defendants Papayans, Angelo Ferrara, Johnston, Blakeman, Charlie Ferrara and Frank Ferrara

¹ Defendant N.F. was dismissed from this action without prejudice on July 27, 2017. Dkt. No. 297. The Court will generally refer to specific individual defendants by their last name. However, because there are three individual defendants with the last name “Ferrara,” the Court will refer to those defendants by their full names. The Court will refer to Defendants Lee, Blakeman, Johnston, Papayans, Angelo Ferrara, Frank Ferrara and Charlie Ferrara collectively as the “Individual Defendants.”

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filed their motions for summary judgment on July 24, 2017. Dkt. Nos. 278, 279, 283-86. Plaintiffs filed their opposition to the City Defendants' motion for summary judgment on July 31, 2017. Dkt. No. 299. Plaintiffs filed their opposition to the Individual Defendants' motions for summary judgment on August 7, 2017. Dkt. No. 328. The City Defendants filed their reply on August 7, 2017, and the Individual Defendants filed their replies on August 17, 2017. Dkt. Nos. 338, 409-418.

On August 8, 2017, Plaintiffs filed their Rule 56(d) Motion. Dkt. No. 397. Plaintiffs request that the Court deny Defendants' motions for summary judgment, or, in the alternative, that Plaintiffs be allowed to resolve their discovery disputes, gather the discovery they seek, and file supplemental oppositions to the motions. Pls.' Mem. of Points and Authorities in Support of Rule 56(d) Mot. ("MPA"), Dkt. No. 397-1, at 1. Plaintiffs base their Rule 56(d) Motion on discovery deficiencies and delays by the City Defendants, Defendant Papayans, and Defendants Charlie and Frank Ferrara. *Id.* at 1-2. On August 15, 2017, Defendants Blakeman, Papayans, Charlie and Frank Ferrara, and the City Defendants filed their oppositions to Plaintiffs' Rule 56(d) Motion. Dkt. Nos. 404-407. Plaintiffs filed their reply on August 22, 2017. Dkt. No. 428.

On August 22, 2017, Plaintiffs filed their Motion for Sanctions Against Defendants Charlie Ferrara, Frank Ferrara, and Sang Lee ("Motion for Sanctions"). Dkt. No. 425.

On August 28, 2017, District Judge Otero referred to the undersigned Plaintiffs' Rule 56(d) Motion for disposition and Plaintiffs' Motion for Sanctions for a Report and Recommendation. Dkt. No. 435 ("Referral Order"). Judge Otero also authorized the undersigned to consider all pending discovery matters and conduct further hearings and proceedings as may be appropriate or necessary. *Id.*

A. Discovery-Related Proceedings

The parties have been involved in a number of discovery disputes before the undersigned, starting in November 2016. *See, e.g.*, Dkt. Nos. 141, 151, 212, 217. The Court has permitted the parties to contact the Court for discovery disputes so that, when possible, disputes can be resolved informally without extensive briefing. *See, e.g.*, Dkt. No. 212 (directing the parties to contact the Court's Courtroom Deputy Clerk to schedule a telephonic conference if the parties are unable to reach a resolution through meet and confer efforts). Relevant to the instant motion,

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Plaintiffs have raised disputes or submitted filings for discovery requested from Defendants Papayans, Charlie and Frank Ferrara, and the City Defendants. The discovery cut-off was August 7, 2017. Dkt. No. 120. After the District Judge’s referral, the Court held hearings regarding the referred matters and pending discovery disputes on September 5, 2017 (“September 5 hearing”) and September 12, 2017 (“September 12 hearing”). *See* Dkt Nos. 436, 443, 452. The filings and proceedings specific to each defendant addressed in Plaintiffs’ Rule 56(d) Motion will be discussed below in Section III.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(d) provides that “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition,” a court may defer consideration of a summary judgment motion or deny it, allow additional time to take discovery, or issue any other appropriate order.

The party seeking relief pursuant to Rule 56(d) carries the burden “to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment.” *Atay v. County of Maui*, 842 F.3d 688, 698 (9th Cir. 2016) (citing *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001)). The party requesting relief must show: (1) specific reasons why the alleged evidence was not discovered or obtained earlier in the proceedings; (2) specific facts it hopes to elicit from additional discovery; (3) that the facts sought actually exist; and (4) that these sought-after facts would overcome the opposing party’s Motion for Summary Judgment. *Hollyway Cleaners & Laundry Co. v. Central National Insurance Co. of Omaha, Inc.*, 219 F. Supp. 3d 996, 1003 (C.D. Cal. 2016) (citing *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996)). The rule “provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence.” *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1000 (9th Cir. 2002).² A district court “does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past.” *Nidds*, 113 F.3d at 921 (citation omitted).

² Former Federal Rule of Civil Procedure 56(f) is “substantively the same as current Rule 56(d).” *Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 899 n. 7 (9th Cir. 2012). The Court therefore applies case law concerning former Rule 56(f) to this motion.

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III. DISCUSSION

A. Defendant Papayans

Plaintiffs base their Rule 56(d) Motion in part on Defendant Papayans’ refusal to produce his cellular phone data. On July 3, 2017, Plaintiffs and Defendant Papayans submitted a stipulated order for release of Defendant Papayans’ cellular phone. Dkt. No. 259. Plaintiffs were directed to re-file the stipulation because of a deficiency, and the stipulation was re-submitted on July 7, 2017. Dkt. No. 263. The Court issued the stipulated order on July 12, 2017. Dkt. No. 265. The order directed the Los Angeles Police Department to release Defendant Papayans’ cellular phone to his discovery vendor and it provided a process by which data was to be extracted, reviewed, and produced. *See id.*

i. The Parties’ Arguments

Plaintiffs state that they have been diligently seeking the cellular telephone records of Defendant Papayans. MPA at 7. However, because his phone was in the custody of the Los Angeles Police Department, the parties had to enter into a stipulation for release of the phone to the custody of an eDiscovery vendor. *Id.* at 7-8. After the phone was delivered, the vendor was not able to access the phone data. *Id.* at 8. Plaintiffs assert that these records are required to further demonstrate Defendant Papayans’ involvement in the Lunada Bay Boys’ attempts to restrict access to Lunada Bay and the scope of the conspiracy between and among the Lunada Bay Boys and the City. *Id.* Plaintiffs further argue that they have taken exhaustive measures to obtain this data, and Defendant Papayans has a duty to supplement under Rule 26(e)(1)(A). Pls.’ Reply in Support of Rule 56(d) Mot. (“Reply”), Dkt. No. 428, at 2.

Defendant Papayans provides that his discovery vendor was unable to access the phone, but he has retained another provider to access the phone. Opp’n by Def. Michael Papayans to Pls.’ Rule 56(d) Mot., Dkt. No. 406, at 2-3. Defendant Papayans argues that Plaintiffs have not met their burden of showing entitlement to administrative relief, but requests that the Court continue Defendant’s motion for summary judgment if the Court is inclined to grant Plaintiffs’ Rule 56(d) Motion. *Id.*

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ii. Post-Referral Proceedings

At the September 5 hearing, counsel for Defendant Papayans stated that the second provider was able to access the released phone and an extraction report was being prepared. At the September 12 hearing, counsel stated that the extraction report had been produced. Also at the September 12 hearing, Plaintiffs' counsel stated that Plaintiffs had not received cellular phone records that the prosecution in an unrelated criminal action involving Defendant Papayans had produced to Defendant Papayans' criminal defense attorney. The Court ordered Defendant Papayans to produce those records by September 22, 2017. *See* Dkt. No. 452.

iii. Analysis

After consideration of Plaintiffs' Rule 56(d) Motion, Defendant Papayans' Opposition, Plaintiffs' Reply, and the arguments presented at the September 5 and 7 hearings, the Court concludes that Plaintiffs are entitled to relief under Rule 56(d) with respect to the discovery requested from Defendant Papayans. The Court finds that Plaintiffs were diligent in attempting to obtain Defendant Papayans' cellular phone records prior to the discovery cut-off, but were unable to do so because of unexpected difficulties in the extraction process. Defendant Papayans has since produced the extraction report from the released phone. In addition, the Court has compelled Defendant Papayans to produce additional records relating to the same phone that are in possession of his criminal defense attorney. The Court finds it appropriate to provide Plaintiffs the opportunity to supplement their opposition to Defendant Papayans' motion for summary judgment with the additional discovery Plaintiffs have obtained, as set forth below in Section IV.

B. Defendants Charlie and Frank Ferrara

Plaintiffs also base their Rule 56(d) Motion in part on Defendants Charlie and Frank Ferrara's delay in producing cellular phone records. The Court held a telephonic hearing on July 13, 2017 regarding production of cellular phone records by these two defendants. Dkt. No. 267. The Court ordered Defendants Charlie and Frank Ferrara to produce responsive documents by July 17, 2017. *Id.* The parties participated in another telephonic hearing on July 26, 2017, when the Court was informed that Defendants Charlie and Frank Ferrara had not completed their production by the ordered deadline and had yet to complete their production as of the time of the

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hearing. *See* Dkt. No. 296. The Court ordered further briefing on Plaintiffs' request for sanctions, and held a further hearing on August 23, 2017. *See* Dkt. Nos. 403, 423, 432. The Court granted Plaintiffs' request for sanctions as it pertained to the failure to comply with the Court's July 13, 2017 order. Dkt. No. 432.

i. The Parties' Arguments

Plaintiffs contend in their Rule 56(d) Motion that because Defendants Charlie and Frank Ferrara obstructed the discovery of their cell phone records, Plaintiffs only received the requested records on July 26, 2017. MPA at 8. Plaintiffs assert that the productions are heavily redacted and they did not have sufficient time to analyze the completeness of the production prior to the deadline for their opposition to Defendants' motions for summary judgment. *Id.* at 11-12. Plaintiffs argue that the records will help them identify communications that Defendants Charlie and Frank Ferrara may have had with other Individual Defendants regarding the incidents underlying Plaintiffs' claims, including the assault on Plaintiff Reed. Reply at 3.

Defendants Charlie and Frank Ferrara respond that Plaintiffs have not provided evidence supporting a reasonable belief that further discovery will lead to evidence supporting denial of their motion for summary judgment. Frank Ferrara's and Charlie Ferrara's Opp'n to Pls.' Rule 56(d) Mot., Dkt. No. 407, at 2. In addition, Defendants Charlie and Frank Ferrara state that because of the lack of volume of responsive information remaining after the redactions, Plaintiffs should have had sufficient time to review the documents in responding to Defendants' motions for summary judgment. *Id.* at 8.

ii. Post-Referral Proceedings

Counsel for Defendants Charlie and Frank Ferrara represented at the September 5 hearing that additional documents were still being gathered and produced, including those being located by a third-party cellular service provider. At the September 12 hearing, counsel for Defendants Charlie and Frank Ferrara stated that with the exception of specific older records that their third-party provider was attempting to locate, all records that exist had been produced. However, counsel stated that some text message chains had not been recovered. Plaintiffs and Defendants Charlie and Frank Ferrara were directed to submit further briefing on Plaintiffs' Motion for Sanctions regarding any unrecoverable data. *See* Dkt. No. 452.

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iii. Analysis

After consideration of Plaintiffs’ Rule 56(d) Motion, Defendants Charlie and Frank Ferrara’s Opposition, Plaintiffs’ Reply, and the arguments presented at the September 5 and 7 hearings and other related proceedings, the Court concludes that Plaintiffs are entitled to relief under Rule 56(d) with respect to the discovery sought from Defendants Charlie and Frank Ferrara. Plaintiffs have been diligent in attempting to procure the requested discovery from Defendants Charlie and Frank Ferrara. Plaintiffs raised the discovery dispute regarding Defendants Charlie and Frank Ferrara’s cellular phone records at the July 13, 2017 hearing, and the Court compelled Defendants Charlie and Frank Ferrara to produce their cellular phone records shortly thereafter so that Plaintiffs could refer to relevant records in their oppositions to Defendants’ motions for summary judgment. Defendants failed to comply with the Court-ordered deadline for production and the Court granted sanctions in the form of reasonable attorney’s fees caused by the failure to comply with the Court’s order. Dkt. No. 432. Although the parties were able to resolve the monetary amount of sanctions without further Court intervention, *see* Dkt. No. 444, Defendants Charlie and Frank Ferrara’s failure to fully comply with their discovery obligations has led to Plaintiffs’ inability to present facts from the requested discovery to oppose Defendants’ motions for summary judgment. Moreover, it appears that Plaintiffs continued to receive responsive documents as recently as September 21, 2017. *See* Dkt. No. 468-1 at 5.

The Court finds it appropriate to provide Plaintiffs the opportunity to supplement their opposition to Defendants Charlie and Frank Ferrara’s motions for summary judgment with the additional discovery Plaintiffs have obtained, as set forth below in Section IV.

C. The City Defendants

Plaintiffs further base their Rule 56(d) Motion on the City Defendants’ failure to produce records from the personal devices of police officers of the Palos Verdes Estates (“PVE”) Police Department. Plaintiffs previously raised a discovery dispute with the City Defendants regarding an investigation report of the source of a leak of a PVE Police Department undercover operation at a June 8, 2017 telephonic hearing. Dkt. No. 246. Although the Court ordered further briefing on the merits of the dispute, the City Defendants agreed to release the investigative report without further Court intervention. *See* Dkt. No. 250.

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Plaintiffs state that they intended to raise another dispute regarding records from the personal devices of PVE police officers at a July 25, 2017 telephonic hearing, which had been scheduled to address a discovery dispute involving a different defendant. Reply at 2. Both counsel for the City Defendants and the PVE Police Officers' Association ("POA") appeared at the July 25 hearing. *See* Dkt. No. 290; July 25, 2017 Hr'g Tr., Dkt. No. 421, at 4:20-21. At the July 25 hearing, the Court indicated that it would not have time to address additional issues and asked the relevant parties to meet and confer to propose dates for the Court to hold another hearing. July 25, 2017 Hr'g Tr. 5:3-14. Counsel for Plaintiffs stated that Plaintiffs would want a hearing regarding the City's discovery, but did not state what was in dispute. July 25, 2017 Hr'g Tr. 27:2-14. Ultimately, the parties did not contact the Court to schedule a hearing regarding this dispute. Plaintiffs then filed a motion to compel against the City Defendants on August 7, 2017, the discovery cut-off date. Dkt. No. 393. The motion to compel was denied as untimely, but the Court stated that if District Judge Otero granted Plaintiffs' Rule 56(d) Motion, Plaintiffs could raise the discovery disputes again before this Court. Dkt. No. 401.

i. The Parties' Arguments

Plaintiffs assert in their Rule 56(d) Motion that the City has failed to produce responsive material from PVE police officers' personal cellular phones. MPA at 5-6. Plaintiffs state that the dispute arose as early as November 22, 2016. *Id.* at 6. The parties engaged in telephonic meet and confers in June 2017, and Plaintiffs state that they sought the requested discovery in their motion to compel filed on August 7, 2017. *Id.* Plaintiffs require these records because they will include communications between and among police officers and the Lunada Bay Boys that show how the City Defendants supported the Lunada Bay Boys in their efforts to keep non-locals out of Lunada Bay. *Id.* at 15. Plaintiffs argue that they only discovered in late June and July 2017 that police officers communicate and associate with the Lunada Bay Boys, yet the City had not searched any officer's personal cell phone records. Pls.' Mem. in Support of its Request for Records from the Personal Devices of Palos Verdes Estates Police Officers ("Diligence Brief"), Dkt. No. 464, at 1-2. Plaintiffs assert that they learned of links between officers and the Lunada Bay Boys only when the City's internal investigation report of the unsuccessful February 13, 2016 undercover operation was produced on June 13, 2017, and Sergeant Barber was deposed on June 22, 2017. *Id.* at 6. Plaintiffs contend that they raised this issue at the July 25, 2017 telephonic hearing, in their motion to compel filed on August 7, 2017, and in their Rule 56(d) Motion. *Id.* at 7.

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The City Defendants respond that Plaintiffs were informed as early as November 4, 2016 that the City was prohibited by the PVE POA from compelling any police officer to produce electronically stored information from his or her personal electronic device. City Defs.’ Opp’n to Pls.’ Rule 56(d) Motion (“City Opposition”), Dkt. No. 404, at 1. Plaintiffs attempted to raise the issue during a telephonic hearing for a discovery dispute involving a different defendant, but the Court directed the parties to meet and confer and schedule a hearing the following week. *Id.* at 1-2. Plaintiffs failed to meet and confer, filed an incomplete motion to compel against the City Defendants, and filed a Rule 56(d) motion without conferring with the City Defendants. *Id.* at 2. The City Defendants further assert that the deposition of Sergeant Barber did not reveal that police officers used their personal cell phones for work, as argued by Plaintiffs. City Defs.’ Response to Pls.’ Mem. in Support of its Request for Records from the Personal Devices of Palos Verdes Estates Police Officers (“Diligence Response Brief”), Dkt. No. 465, at 3.

ii. Post-Referral Proceedings

At the September 5 hearing, the Court ordered the City Defendants to provide additional discovery and explanation for two items addressed as “Disputed Discovery” in Plaintiffs’ August 7, 2017 motion to compel. *See* Dkt. Nos. 393, 443. At the September 12 hearing, Plaintiffs and the City Defendants confirmed that the requested documents and explanation had been produced. The Court denied Plaintiffs’ request for additional discovery that was not raised in either their motion to compel or their Rule 56(d) Motion. *See* Dkt. No. 452. With respect to Plaintiffs’ request for cellular phone records from the personal devices of PVE police officers, counsel for PVE POE and the City Defendants objected at the September 5 hearing. At the September 12 hearing, the Court ordered Plaintiffs and the City Defendants to brief the issue of diligence for entitlement to Rule 56(d) relief. Plaintiffs filed their brief on September 21, 2017, Dkt. No. 464, and the City Defendants filed their brief on September 25, 2017, Dkt. No. 465.

iii. Analysis

The Court concludes that Plaintiffs have not met their burden for entitlement to Rule 56(d) relief based on the requested discovery from PVE police officers’ personal devices.

“The failure to conduct discovery diligently is grounds for the denial of a [Rule 56(d)] motion.” *Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005 (9th Cir. 2002). District

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courts routinely deny Rule 56(d) motions if the party opposing summary judgment had adequate time to conduct discovery and pursue the requested discovery through a motion to compel, but did not establish good cause for its failure to do so. *See, e.g., Hollyway*, 219 F. Supp. 3d at 1003-04 (party failed to file a motion to compel the discovery it sought until its 56(d) request); *Zamora v. City of Oakland*, No. 12-cv-02734 NC, 2013 WL 4103109, at *4 (N.D. Cal. Aug. 12, 2013) (plaintiffs failed to move to compel documents they believed the City of Oakland was withholding or to seek to extend the discovery deadline before it expired); *Ramsey v. Cardtronics USA, Inc.*, No. 11-cv-1511 BEN (BLM), 2012 WL 1674252, at *5 (S.D. Cal. May 11, 2012) (failure to move to compel is a lack of diligence that bars Rule 56(d) claim).

Here, the Court finds that with respect to the records of personal devices of PVE police officers, Plaintiffs have not been diligent in pursuing this discovery. Plaintiffs did not raise the discovery dispute or request additional time to seek the discovery until filing their Rule 56(d) Motion on August 8, 2017, a day after the discovery cut-off. Plaintiffs were aware of the PVE POA's objections as early as November 2016, yet failed to contact PVE POA's counsel. The objections were repeated in March 2017 when the City responded to Plaintiffs' interrogatories, yet again Plaintiffs did not contact PVE POA counsel. City Opp'n at 4. Plaintiffs have availed themselves of the informal telephonic hearing procedure during the discovery period for a number of discovery disputes, including one with the City, yet they did not raise this issue until the filing of their Rule 56(d) Motion.

Plaintiffs appear to argue that the deposition of Sergeant Barber on June 22, 2017 somehow alerted them to the fact that PVE police officers used their personal devices for work-related communications involving the Lunada Bay Boys. Reply at 2. The City disputes this contention and it appears from excerpts of Sergeant Barber's deposition transcript that he testified that he personally knows some individuals that Plaintiffs have identified as Lunada Bay Boys, and that he and other officers occasionally use their personal phones on the field to communicate with each other, but usually only for personal purposes. Decl. of Christopher D. Gloss in Support of Diligence Response Brief, Ex. 1. Thus it does not appear that Sergeant Barber's deposition provided some basis for Plaintiffs to start seeking the records of PVE police officers' personal devices from the City Defendants.

However, even assuming that Plaintiffs only had a basis to seek these records after the June 22, 2017 deposition, the Court finds that Plaintiffs did not pursue this discovery diligently

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prior to the discovery cut-off. To begin with, the Court notes that over a month passed before Plaintiffs attempted to raise the issue at the July 25, 2017 telephonic hearing. And after being informed that the Court could not consider the issue at the July 25 hearing but would make itself available for additional telephonic hearings if necessary, Plaintiffs failed to schedule a further hearing. This is in contrast to the highly diligent efforts by Plaintiffs to return to the Court for a hearing regarding Defendants Charlie and Frank Ferrara's phone records, which took place on July 26, 2017. In addition, when Plaintiffs stated at the July 26, 2017 hearing that they would like to file a motion to compel, Plaintiffs only mentioned certain Individual Defendants and did not state that they intended to bring a motion to compel against the City Defendants. July 26, 2017 Hr'g Tr., Dkt. No. 325, at 26:1-5.

Finally, in their motion to compel against the City Defendants filed on the discovery cut-off, Plaintiffs only state in their introductory statement that, "[t]o date, there are still documents that have never been produced including phone records of the police officers which are important since deposition testimony has shown that several officers are friends with Bay Boys." Dkt. No. 393-1 at 2-3. Notably, this issue is not addressed in the "Disputed Discovery" section of the motion to compel. *See id.* at 3-7. The Court does not find persuasive Plaintiffs' assertion that they diligently pursued this discovery where the only reference to the specific dispute on the record prior to the discovery cut-off date is one sentence in the introduction to Plaintiffs' motion to compel filed on the discovery cut-off.

The Court therefore denies Plaintiffs' Rule 56(d) Motion to the extent it requests, from the City Defendants, records from PVE police officers' personal devices. However, because the City Defendants have produced additional discovery with respect to the items specifically raised as "Disputed Discovery" in Plaintiffs' motion to compel, Plaintiffs will be provided an opportunity to supplement their opposition to the City Defendants' motion for summary judgment as set forth below.

D. Defendant Blakeman

Although Plaintiffs' Rule 56(d) Motion does not request relief based on any outstanding discovery from Defendant Blakeman, Defendant Blakeman filed an opposition to Plaintiffs' Rule 56(d) Motion. Def. Blakeman's Opp'n to Pls.' Rule 56(d) Motion, Dkt. No. 405. Defendant Blakeman asserts that he has fully complied with discovery requests, and even with his full

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phone records, Plaintiffs have no evidence to implicate him in any illegal activity, via conspiracy or otherwise. *Id.* at 1. Defendant Blakeman contends that Plaintiffs have not established that they are entitled to relief under Rule 56(d), and requests that the Court deny Plaintiffs' request for relief. *Id.* at 5-9.

Plaintiffs have been provided additional discovery from other defendants after they filed their oppositions to Defendants' motions for summary judgment. The Court will allow Plaintiffs to file supplemental briefing in support of their oppositions based on this additional discovery, and Defendants, including Defendant Blakeman, may file supplemental responses. The Court finds that Defendant Blakeman will not be significantly prejudiced by the Court's disposition of Plaintiffs' Rule 56(d) Motion as set forth in this order.

E. Requested Relief

Plaintiffs request that the Court deny Defendants' motions for summary judgment, or, in the alternative, that the Court allow Plaintiffs to obtain the improperly-withheld discovery before ruling on the motions for summary judgment. Reply at 5. Judge Otero has stayed disposition of all pending dispositive motions until resolution of the referred matters. Dkt. No. 435. Therefore, the Court finds that the appropriate relief would be to provide Plaintiffs the opportunity to file supplemental briefing in support of their oppositions to Defendants' motions for summary judgment based on the additional discovery obtained from Defendants. In the interest of fairness, the Court will also provide Defendants the opportunity to file supplemental responses.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion is granted-in-part and denied-in-part. Plaintiffs may file supplemental briefing, no longer than ten (10) pages, by October 18, 2017, in support of their oppositions to Defendants' motions for summary judgment. Defendants may file supplemental responses, no longer than five (5) pages, by October 27, 2017.

IT IS SO ORDERED.

Initials of Preparer :
 slb